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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 492

JOSEPH CELSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph Celso, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 13, 1964, which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey of July 16, 1963, entered July 16, 1963, and filed July 17, 1963.

Citations to Opinions Below

This case was tried before the United States District Court for the District of New Jersey, Honorable ROBERT F. SHAW, Judge of said Court and a jury commencing on April 24, 1963, and terminating on May 24, 1963. Petitioner was found guilty of the charge of possession of goods stolen from an interstate shipment of freight, in violation of Title 18 United States Code Section 659.

Prior to the commencement of the trial petitioner moved, pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure, for an Order suppressing for use as evidence all of the items seized in the fire station at 15 West 22nd Street, by agents of the Federal Bureau of Investigation on January 11, 1962. The motion was denied. It was raised again at the trial and similarly denied. The opinion of the District Court in denying the motion is printed in Appendix B hereto, *infra*, and was not officially reported. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra;* has not as yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on August 13, 1964. A copy thereof is printed in Appendix B hereto, *infra*. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the petitioner had standing to move for the suppression of evidence?

2. Whether the petitioner was entitled to the disclosure of the identity and whereabouts of the confidential informant employed by the F.B.I.?

3. Whether the charge of the trial court so emasculated petitioner's defense of entrapment so as to constitute plain error?

4. Whether the inconsistent charges of the trial court on the element of guilty knowledge and the erroneous charge on the doctrine of constructive possession constituted plain error?

5. Whether the arrest of petitioner was invalid, as being made without an arrest warrant?

Statutes Involved

The statutory provision involved is 18 U.S.C. Sec. 659. It is printed in Appendix A, *infra*.

Statement

Petitioner and four others were indicted in the District Court of New Jersey on an indictment containing five Counts in which all defendants were named. The First Count charged them with unlawful possession of goods stolen from interstate commerce in violation of Title 18 U.S.C., Section 659. Count 2 charged *receiving*, Count 3 *concealment*, Count 4 *storing*, and Count 5 *disposing* of goods valued in excess of $5,000.00 which had been moved in interstate commerce in violation of Title 18 U.S.C., Section 2315 (14a to 18a).*

Before the trial, all defendants, including petitioner moved in the District Court for an order declaring their arrest illegal and void, and for suppression of the evi-

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* "a" refers to the record abstract printed as appellant's appendix in the United States Court of Appeals for the Third Circuit, which appendix has been certified and filed with this petition as a part of the official record below.

dence seized at the time of their arrest on the ground that said arrest and the subsequent search and seizure were made without a warrant and without probable cause and therefore in violation of their constitutional rights and the Rules of Federal Criminal Procedure (18a-19a). This motion made by petitioner which was heard immediately preceding the trial was marked by seven days of testimony and petitioner's motion was denied. A written opinion was rendered by the Court (305a to 320a).

Count 2 of receiving was withdrawn by the government after the defense argued for an election between Count 1 and 2 at the end of the government's case.

On Count 5, the Court ordered a judgment of acquittal at the end of the case.

Petitioner was acquitted by the jury on Counts 3 and 4 and found guilty of unlawful possession on Count 1.

On December 21, 1961 a truck was hijacked in Parksville, New York and approximately 3,000 suits were stolen therefrom. The truck was later found in Suffern, New York (42a to 43a). This theft was the only one of such magnitude during this period of time (44a).

Several weeks after the theft an informant for the F.B.I. called Agent Parker and told him over the telephone that "there was an apparently unlimited quantity of Bond clothes available that was being disposed of in the Bayonne, New Jersey area" and it was in the area of a tavern known as the Hoo-Ha Club (94a). The agent received specific numbers which he recorded (94a). Further investigation revealed that the numbers were part of the stolen shipment (44a).

On January 10, 1962 agents of the F.B.I. took up a surveillance at about 7:30 P.M. in the area surrounding the Hoo-Ha Club. They saw a car pull into an abandoned gar-

age across the street from the club and later on it was parked by the curb (45a to 46a). Agent Straub then walked by this car and saw several suits in the back seat which had white tags (46a, 86a). The surveillance then was called off (46a).

On January 11, 1962 Agents Straub and Tootell procured a search warrant from Commissioner Clohosey which was turned over to Agent Roetzel who was in charge between 3:00 and 5:00 P.M. Agent Roetzel had this search warrant at the time of the arrests and raid (83a; 88a to 89a).

A second surveillance was arranged for 7:00 to 7:30 on the same day of January 11, 1962. During this surveillance ten or twelve agents were used (46a; 61a). At 9:30 a car was seen being backed into the garage (47a) and some men were seen walking from the Hoo-Ha Club into the garage (47a). Thereafter, four agents stood in front of the garage for about 50 minutes (48a). The front overhead type door in the front of the garage then went up. The agents flashed lights into the building, saw clothing in piles on the floor, announced the arrests of the unknown persons in the garage from the sidewalk and then walked in where they took the men in custody and confiscated the suits (48a). The five men in the garage were petitioner and the four defendants in the trial below.

The petitioner testified that the late afternoon of January 11, 1962 he was brought by a plumber, Albert Barberio, to the home of Mrs. Nellie J. Reylea for the purpose of estimating tile work for her bathroom and kitchen. Thereafter Barberio brought him to a restaurant in Bayonne owned by Barberio's daughter. While in the restaurant he was approached by an unknown man to rent his station wagon for the evening. That evening he met this unknown man who brought him to the garage where the

wagon was loaded and the man left the garage with instructions to wait. While sitting in the wagon the agents came in and apprehended him. In addition to contending he was without knowledge of the stolen character of the suits in his vehicle, he was entrapped. The defendant was corroborated by Mr. Barberio and Mrs. Reylea.

Reasons for Granting the Writ

1. This Court should review the decision of the Court of Appeals to settle the law as to whether a defendant in a federal criminal trial has standing, under Rule 41 (e) of the Federal Rules of Criminal Procedure to move for suppression of evidence, when a charge of "criminal possession" of an item has been made against him. It is an issue vital to the effective administration of criminal justice in the federal courts, and one of frequent recurrence. It is urged that the court below has read into *Jones* v. *United States*, 362 U. S. 257 (1960) a curtailment or restriction of its rationale that was never intended by this Court. The decision of the Court of Appeals has also resulted in a conflict among the various circuits, which this Court should resolve.

The Court below held that petitioner did not have standing to move for suppression of evidence because the "abandoned" building in which petitioner was arrested, and his presence therein, was not protected by the Fourth Amendment. The Court then went on to state that the charge of possession of stolen goods did not give petitioner the requisite standing to move for suppression. The Court's rationale was stated thusly:

> "Nor does the ambivalent argument that possession of the stolen clothes in the defendant 'eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which

ordinarily is required when standing is challenged.' Jones p. 263. That holding was specifically directed to the sui generis problem before the Court as to which the latter held p. 263. 'The same element in this prosecution (narcotics) which has caused a dilemma i.e. possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, *which ordinarily is required when standing is challenged.*" (Emphasis added.) (Adv. Op. Page 6), Appendix B, *infra.*

Petitioner contends that *Jones, supra*, is not limited to prosecutions under 26 U.S.C. Section 4704 (a), or associated statutory provisions of the narcotics laws, and that a charge of possession of any item, which possession forms one of the bases of the criminal charge, is in and of itself enough to confer standing upon one to move for suppression. The Eighth, Fourth and Fifth Circuits have so held, as has the United States District Court for the District of Massachusetts.

In *Foster* v. *United States*, 281 F. 2d 310 (8th Cir. 1960) the appellant was convicted of possession of an adding machine stolen from an interstate shipment of freight, in violation of 18 U.S.C. Sec. 659. It had been found in his wife's tavern, and he had admitted use of it, as well as its purchase. Appellant's motion to suppress was denied. The Court held it was error, reversed the conviction, and citing *Jones* v. *United States supra*, set forth, *inter alia*, one of the reasons for the reversal:

> "We think the defendant, despite somewhat vague and elusive connection with the tavern cannot be said, as a matter of law, to have been without 'standing' to complain of the introduction into evidence of the stolen adding machine, *with the possession of which he was charged.*" 281 F. 2d at 312 (Emphasis added.)

The *Jones* rationale has been extended to cases involving the possession of non-tax paid alcohol, under 26 U.S.C. Section 7206 (4). That statute, coupled with other sections of the Internal Revenue Code of 1954, such as 26 U.S.C. Section 5205 (a) (2) and 5604 (a) (1) proscribe not the mere possession, removal, concealment or deposit of such alcohol, but proscribe those acts "*with the intent to evade or defeat the assessment or collection of any tax imposed* * * *" 26 U.S.C. Section 7206 (4). A specific intent to evade taxes is an essential statutory element of the offense.

Nonetheless, the mere possession, which alone would not convict, has given rise to standing to move for suppression. See, for example, *United States* v. *Mullin*, 329 F. 2d 295 (4th Cir. 1964) wherein the Court stated:

> "Preliminarily, we find that defendants were charged with a possessory crime and each had proper standing to file a motion to suppress. Jones v. United States, 362 U. S. 257 * * *" 329 F. 2d at 296. See also, *Monnette* v. *United States*, 299 F. 2d 847, 849 (5th Cir. 1962).

In *United States* v. *Festa*, 192 F. Supp. 160 (D. C. D. Mass. 1960), the defendant moved for suppression of certain envelopes and papers taken from their persons during the execution of a search warrant upon a store. (No warrants had issued for the arrest or search of either defendant.) Each defendant was charged with violation of the wagering tax act, in that they had not procured their $50.00 annual stamps. *Possession of the papers and envelopes was not the crime charged.* The Government would ultimately have to have proved that the defendants accepted wagers without buying the required stamps. With respect to the element of standing to move for suppression, the learned Judge WYZANSKI stated:

"Where the Government predicates the alleged guilt of a defendant upon his possession of an item * * * the defendant has the status to petition for the return and suppression of the item." 192 F. Supp. at 164.

While proof of possession alone under 18 U. S. C. Sec. 659 will not convict, as a practical matter this element usually swings the balance. Elements of this offense such as the theft, interstate commerce and value of the goods are in reality only technical matters to confer jurisdiction for the offense upon the Federal Court. The main thrust of the offense, which secures the conviction is the possession itself, due to the availability by the Government to have the jury instructed to the effect that possession of recently stolen property, if not satisfactorily explained, is a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances that the person in possession knew the property had been stolen. See *Jury Instructions and Forms*, 27 F. R. D. 43, 195, 196 (1960) and cases cited therein. Such an instruction was given to the jury in the instant case (259a to 260a). For all of these reasons, petitioner urges that a clarification of *Jones, supra,* by this Court is imperative.

2. This Court is responsible for the judicial supervision of the administration and enforcement of criminal justice in the Federal Courts. *McNabb* v. *United States*, 318 U. S. 332 (1942); *Marshall* v. *United States*, 360 U. S. 310 (1959). The duty of the Government in a criminal case is to see that justice is done, and not simply that it shall win a case. *Berger* v. *United States*, 295 U. S. 78, 88 (1935). Petitioner contends that justice was not done; in fact it was perverted by the failure of the trial court to compel the Government to disclose the identity and whereabouts of the confidential informant employed in this case.

In *United States* v. *Collier*, 313 F. 2d 157 (7th Cir. 1963) *cert. den.* 394 U. S. 844 (1963), the defendant raised the defense of entrapment, in that he was imposed upon to purchase narcotics for a special employee of the Bureau of Narcotics. The defendant could not find him at the time of trial; the Government played "hide and seek" and refused to produce him at trial. Only this witness could establish defendant's innocence. The Seventh Circuit reversed the conviction and the Government's petition for certiorari was denied by this Court.

In this case at bar, the petitioner was never connected to the hijacking of the stolen merchandise. He was never seen at the firestation before January 11, 1962. There was no refutation by the Government that he was brought to the garage by an unknown man who wanted to rent his station wagon. Petitioner raised entrapment, but was precluded from establishing his defense because the trial court would not compel the Government to disclose the informer. It may have been the man who brought Celso to the firestation. Candidly, it might not have been, but petitioner was at least entitled to have the man produced in Court in order to have a fair and honest hearing on this issue. As in *Collier, supra*, the Government played "hide and seek" with its informer (107a, 108a, 109a).

The facts as to how petitioner was brought to the firestation, by a stranger, whom he never saw before or after, are not the "fertile imagination of counsel". *Miller* v. *United States*, 273 F. 2d 279, 281 (5th Cir. 1959) but rather hard, cold, undisputed facts overwhelmingly reeking of an entrapment. As such, *Scher* v. *United States*, 305 U. S. 251, 254 (1938); *Wilson* v. *United States*, 59 F. 2d 390 (3d Cir. 1932); *United States* v. *Blich*, 45 F. 2d 627, 629 (D. C. D. Wyo. 1930); *United States* v. *Keown*, 19 F. Supp. 639, 645, 646 (D. C. W. D. Kansas 1937); *United States* v. *Andolshek*,

142 F. 2d 503, 506 (2d Cir. 1944), and *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950), *cert. den.* 342 U. S. 920 (1952) are all applicable.

Roviaro v. *United States*, 353 U. S. 53, 64 (1957) is on all fours with the case before this Court, and particularly so when it is noted that there Mr. Justice BURTON said, with regard to the nameless and faceless informant:

> "His testimony *might* have disclosed an entrapment." (Emphasis added.)

And of more recent vintage, see Mr. Justice DOUGLAS' dissenting opinion in *Rugendorf* v. *United States*, 84 S. Ct. 825, 832 (1964). The dissent, for purposes of this case, could be paraphrased in part as follows:

> "His only defense would be proof that someone • • • [took him to the garage] who that person was • • • what were his motivations • • • [in doing so]. • • • what were his relations with the defendant, what connection did he have with the stolen articles [or the Government]—these questions go to the heart of the defense." 84 S. Ct. at 832.

3. Again, under its supervisory powers, this Court should review the charge of the trial court to determine, as petitioner contends, that it constituted plain error cognizable by this Court at any time under Rule 52 (b) of the Federal Rules of Criminal Procedure and Rule 40(1)(d)(2), Supreme Court of the United States Revised Rule, 28 U. S. C. Section 1254, *et seq.*

Petitioner contends that the charge was extremely caustic and prejudicial. He invoked and raised the defense of entrapment. He was precluded from establishing a full and complete record on this issue, due to the failure of the Court to compel the Government to disclose, or produce,

the confidential informer employed by the F.B.I. *Roviaro* v. *United States*, 353 U. S. 53 (1956); *United States* v. *Collier*, 313 F. 2d 157 (7th Cir. 1963), *cert. den.* 394 U. S. 844 (1963). Petitioner raised the defense of entrapment inasmuch as the Court would permit him to. He was entitled to a fair and impartial instruction to the jury. The initial charge to the jury was erroneous, in that the Court charged that in essence for entrapment to be a valid defense, it must be committed by "officers of the Government" (261a). After an objection, and apparently realizing that entrapment is a valid defense when the criminal conduct which transpired was the product of "creative activity" of law enforcement officers, whether they took an actual part in it or not, *Sherman* v. *United States*, 356 U. S. 369 (1958), the Court attempted to correct its charge (286a). However, the clearly caustic, opinionated and prejudicial remarks by the Court while charging on entrapment on each occasion in effect vitiated the entire instruction.

Unless the defense of entrapment can be determined by the trial Court as a matter of law, it must be submitted to the jury as a factual question, *with proper instructions from the Court*. *Sorells* v. *United States*, 287 U. S. 435 (1932); *Sherman* v. *United States, supra*. The failure of the Court to render an instruction on entrapment when it has been factually raised by the defense is reversible error. *Wall* v. *United States*, 65 F. 2d 993 (5th Cir. 1933); *Lufty* v. *United States*, 198 F. 2d 760 (9th Cir. 1952); *United States* v. *Sawyer*, 210 F. 2d 169 (3d Cir. 1954); *United States* v. *Collier, supra*. The conduct of this trial court created a situation just as though it had never bothered to charge on the defense of entrapment at all.

In the basic charge the Court stated:

> "Now, ladies and gentlemen of the jury, during the course of the summation, counsel raised the question

of the defense of entrapment. *I do not recall any evidence in this case upon which that defense might rest.* * * *" (Emphasis added.) (261a)

The Court thereafter magnified its own belief that entrapment did not exist and was some kind of a "sham" or "smoke screen," and rendered the entire instruction nugatory when it again said:

"So consider any reference I made to testimony in that light, *and here again particularly I do recall that I mentioned to you in connection with the defense of entrapment that I did not recall any testimony that made that defense applicable.*" (Emphasis added.) (287a)

The Court in effect said to the jury "I'm instructing you on the defense of entrapment, but as far as I am concerned it doesn't exist in this case." Petitioner contends that the charge, framed with such opinionated and prejudicial remarks, was tantamount to no charge at all. *Cf. Marson* v. *United States,* 203 F. 2d 904 (6th Cir. 1953).

A case similar to the one at bar is *United States* v. *Nani,* 218 F. 2d 730 (2d Cir. 1955). Here the appellant was convicted of paying a bribe to a Federal Narcotics Agent. The defense was entrapment. Appellant contended that the agent Dugan conceived the plan, lured and induced appellant to pay over money to him. As to the strength and weight of the defense, the Court had occasion to comment:

"There was more than sufficient evidence in the testimony of several government agents and in the undisputed attendant circumstances to warrant the jury in rejecting Nani's claims as sheer fabrication." 218 F. 2d at 731.

The testimony at trial presented an irreconcilable conflict as to whether the genesis of paying a bribe to Dugan originated with agent Dugan, or with one Frank Pracenti, whose brother, Peter, was facing a narcotics charge in California, as was appellant. The following colloquy occurred between the Court and counsel during summation:

"Frank says, and if Frank lied then he deliberately, with malice aforethought, went out to get Nani into trouble. If he didn't lie, then Dugan deliberately, with malice aforethought, went out to get Nani into trouble—either one of the two of them—and as far as I can see the facts, it makes no difference.

"The Court: Yes, there is, Mr. Singer. There is quite a difference. I say that there is no evidence here of any entrapment or any coercion by Frank and the Government is not responsible for any coercion by Frank, even if the Government is not responsible for any coercion by Frank, even if the Government employees did it or nobody did it. You follow my instructions and do not say it makes no difference that Frank tried to entrap him or not, because there is not one bit of evidence—

"Mr. Singer: May I respectfully except to your Honor's ruling, and I say as to having named someone, to draw the conclusion that I think can be drawn from the inference in the testimony.

"The Court: Take your exception.

"Mr. Singer: I have taken it.

"The Court: You are going to tell this jury before you get through what you say your defense is, because I honestly, as a judge, still do not understand your defense, and I wish you would enlighten me.

"Mr. Singer: If your Honor wouldn't—

"The Court: Don't do it in your summation.

"Mr. Singer: If you do not want me to do it my way, then I cannot—

"The Court: You will not refer to Frank entrapping the defendant because that is not the way you opened up to charge, because there is no evidence to that here, and I won't let you sidestep to hang it—." Id at 731-732.

In reversing the conviction, the Court of Appeals stated the following:

"The effect of these comments by the Court was to scotch in limine any discussion on the subject of who originated the suggestion that Nani and Dugan get together, presumably on the question of paying money to fix the case. And it was quite evidently the view of the Court that discussion of who started this idea on its way was taboo 'even if the government employees did it or nobody did it.'

• • •

"The instructions contain no clear, or even intelligible statement of what constituted the defense of entrapment. The Court may well have thought the evidence of entrapment was weak and inherently improbable, under the circumstances, and we are inclined to agree; but weighing the evidence is a function of the jury and not of the Court." Ibid.

As to the devastating effect which the Court's impropriety had upon a fair evaluation of the defense of entrapment the Court also noted:

"Indeed, the trial judge told the jury that he could not make out what the defense was, *intimating that it was just lawyer's talk.*" Id. at 733. (Emphasis added.)

4. Again, under its supervisory powers, this Court should review the charge of the trial court to determine, as petitioner contends, that it constituted plain error. (Points No. 2 and 3 *supra*.)

Petitioner finds himself dismayed by the omnibus conclusion of the Court below, which included disposition of petitioner's attack upon the charge of the Court, as "without merit and need of discussion" (Adv. Op. P. 17), Appendix B, *infra*. It is respectfully submitted that the Court below inadvertently overlooked a most critical and substantial issue raised by petitioner with regard to the trial court's erroneous supplemental charge to the jury on the vital issues of possession and guilty knowledge.

The initial charge of the Court as to guilty knowledge was correct (250a). The jury then deliberated from 1:32 P.M. on May 23, 1963 to 3:30 P.M., without reaching a verdict, when a request was then made by the jury to the judge to redefine possession (289a, 292a and 294a). The Court then gave its charge on actual and constructive possession (294a to 296a). This was the charge that totally failed to state that possession, for purposes of the charge in this case, statutorily meant possession of goods with knowledge that the goods were stolen. The instruction was clearly erroneous on its face, and contradictory to the earlier charge.

The jurors then deliberated with this erroneous second charge to guide them as to the law for approximately nine hours or until 12:55 a.m. on May 24, 1963. They retired for the night, presumably resumed deliberations at 10:00 a.m. and at 11:45 a.m. the same morning the jurors returned their verdicts. Without reiterating all of the argument below, it is urged that the question presented is so serious and genuine, that this Court should examine the issues raised by these jury instructions and the applicable

cases of *McFarland* v. *United States*, 174 F. 2d 538 (D. C. Cir. 1949); *United States* v. *Donnelly*, 179 F. 2d 227 (7th Cir. 1950); *Perez* v. *United States*, 297 F. 2d 12 (5th Cir. 1961); *Silverman* v. *United States*, 2 F. 2d 716 (6th Cir. 1924); and in particular *Bollenbach* v. *United States*, 326 U. S. 607 (1946) and *United States* v. *Martell*, 199 F. 2d 670, 672 (3d Cir. 1952). For purposes of argument herein, it is contended that the supplemental charge confused the jury, caused them to ignore the original accurate charge and ultimately forced the jury into a misconception of the law, thereby depriving the appellant of a fair, intelligent, and honest verdict untainted by obvious mistake!

The initial charge of the trial court (256a) and the subsequent charge (295a) were in additional conflict and further error committed in that the latter in effect told the jury that constructive possession, without more, would permit the jury to draw an inference of guilty knowledge (259a to 260a). The law is clearly otherwise. See, *United States* v. *Russo*, 123 F. 2d 420 (3d Cir. 1941); *United States* v. *Strickland*, 205 F. Supp. 299 (D. C. E. D. Michigan 1962); *Sorensen* v. *United States*, 168 Fed. 785, 798-99 (8th Cir. 1909).

As was stated in *Sorensen, supra*:

> "A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability is not sufficient to hold a party responsible to a criminal charge." 168 Fed. at 798.

The trial court clearly erred and the verdict is manifestly tainted. The jury should have been instructed that other *indicia* or *scienter* were requisite to a finding of constructive possession before a verdict of guilty was justified.

5. The Court below has apparently concluded that petitioner's sole attack upon his arrest was that it was made without probable cause (Adv. Op. P. 7), Appendix B, *infra*. Petitioner submits that this is a misconception of his argument, which in essence was twofold. It was, as outlined below: 1) that the arrest was without probable cause and; 2) that the arrest was invalid because it was made without a warrant.

The Government apparently satisfied the United States Commissioner at Newark, New Jersey as to the requisites of probable cause, for on January 11, 1962 the Commissioner issued a "night time" warrant to search the building at 15 West 22nd Street, Bayonne, New Jersey. The agents of the F.B.I. knew petitioner's codefendants by their reputations and as residents of Bayonne. Agent Straub, on January 10, 1962, the night before the arrest, saw Juliano walk in and out of the firehouse, and saw another man as well, driving a car with suits contained in the back seat. The suits sold in the area were known to the F.B.I. to have been part of the hijacked shipment (Government's brief, pages 5, 6, 7). Under the circumstances and with the question of practicability not in issue, it was incumbent upon the Government to obtain arrest warrants, even "John Doe" arrest warrants at the time the search warrant was procured on January 11, 1962.

In *United States* v. *Coplon*, 185 F. 2. 629 (2d Cir. 1950), *cert. denied*, 342 U. S. 920 (1952), agents of the F.B.I. had a similar though actually even greater abundance of facts to constitute probable cause to obtain an arrest warrant for Judith Coplon. They had in addition, all the time in the world, and all the requisite manpower to do so, yet no arrest warrant was procured before Judith Coplon's arrest. As a result, the arrest was ruled invalid and the fruits of the incidental search of her person suppressed.

With specific reference to 18 U.S.C. Sec. 3502 as it then existed, Circuit Judge LEARNED HAND stated:

> "The statute (18 U. S. C. Sec. 3502) requires a warrant when there is time to obtain one, the dispensation is limited to occasions when it is not safe to wait." 185 F. 2d at 635.

Today, 18 U.S.C. Sec. 3502, as amended, fails to contain any provision that an arrest warrant may be dispensed with if there is belief that the suspect will escape or flee. It appears to the writer to be an *a fortiori* proposition, that in the case at hand, the F.B.I. agents, claiming to know all that they did know on the afternoon of January 11, 1962, and being at the office of the United States Commissioner at Newark, New Jersey, were duty bound to obtain, at least as to Juliano, an arrest warrant in his name, and a "JOHN DOE" arrest warrant for the other man the F.B.I. saw driving away in a car with suits from the firehouse. With the proximity of Bayonne and Jersey City, New Jersey, there is, additionally, no reason why warrants for arrest for all the individuals observed entering the firehouse could not have been applied for in the name of John Doe or otherwise, in Jersey City, immediately upon seeing a group of men leave the Hoo-Ha and enter the firehouse at 9:30 P.M. on January 11, 1962.

The opportunity, availability, and practicability of obtaining a warrant, for arrest or a search, has run the gauntlet from *Trupiano* v. *United States*, 334 U. S. 699 (1947) to *Rabinowitz* v. *United States*, 339 U. S. 56 (1950), to *Chapman* v. *United States*, 365 U. S. 610 (1961) and *Ker* v. *California*, 374 U. S. 23 (1964). As the law stands today, petitioner submits that the Constitutional Command is that if a warrant may be obtained, *it must be obtained.*

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. QUERQUES

DANIEL E. ISLES

Attorneys for Petitioners.

Dated: September 10, 1964.

APPENDIX A

Statutory Provisions Cited and Quoted (18 U. S. C. Section 659—Interstate or Foreign Baggage, Express or Freight; State Prosecutions)

§659. Interstate or foreign baggage, express or freight; state prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce

or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits, under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. June 25, 1948, c. 645, 62 Stat. 729, amended May 24, 1949, c. 139, §13, 63 Stat. 91.

APPENDIX B

(Copies of Opinions and Judgments Below)

Opinion and Order of the United States District Court for the District of New Jersey Denying Petitioner's Motion for Suppression of Evidence

OPINION OF SHAW, U. S. D. J., ON TRIAL MOTION TO SUPPRESS EVIDENCE, ETC. (JULY 10, 1963)

Appearances:

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LOUIS J. GREENBERG, ESQ.
Attorney for Defendant, Joseph Nalewajka.

SHAW, U. S. D. J.:

Upon consideration of the text of the transcript of the oral opinion disposing of the motion to suppress evidence in this matter, it is felt that it should be edited and restated to read as follows:

Appendix B

The defendants are charged by Indictment with violation of Title 18, U. S. Code, Sections 659 and 2315. The offenses are alleged to have occurred on or about January 11, 1962. The goods in question consisted of men's suits, coats, and wearing apparel. The premises involved in this case are located at 15 West 22nd Street, Bayonne, New Jersey.

On the night of January 11, 1962, the defendants, Harold Konigsberg, Joseph Juliano, Joseph Celso and Joseph Nalewajka, were arrested by Agents of the Federal Bureau of Investigation while these defendants were on premises at 15 West 22nd Street, Bayonne, New Jersey, and men's wearing apparel found on the premises was seized at that time by the Agents.

Subsequently, on January 12, 1962, the defendant, John Joseph Zax, was arrested and taken into custody. His interest in the premises in question arises out of an alleged oral rental agreement which he had entered upon with the owner during the latter part of December, 1961. The agreement, as the evidence indicates, was the granting of a right to use the building for storage purposes on a month-to-month rental basis at the rate of $100 per month. Rental for the first month was paid in cash.

The defendants move pursuant to Rule 41(e) to suppress the use in evidence at trial against defendants of the men's wearing apparel which was seized by the F.B.I. Agents on January 11, 1962. Testimony has been taken on the question of whether any one or more of the defendants has standing to challenge the seizure and on the further question of whether or not the arrests made without a warrant were unlawful. At the conclusion of testimony relating to standing of any one or more of the defendants to challenge the seizure as the product of an unlawful search,

the Court reserved decision and continued the hearing on whether there was probable cause for the Agents to believe on the evening of January 11, 1962, at the time they arrested the defendants, Harold Konigsberg, Joseph Juliano, Joseph Celso and Joseph Nalewajka, that a felony had been committed or was in process of being committed by these defendants on the premises at 15 West 22nd Street, Bayonne, New Jersey.

It seems clear from the case law on the construction and application of Rule 41(e) that to qualify as a person aggrieved by an unlawful search and seizure, it must be shown that such person has some interest in the premises searched. The extent of such an interest and the burden upon a defendant to establish it is open to question. It has been held that a defendant is not required to bear the burden of proof to establish an interest in the premises searched where to do so would either incriminate him with respect to the offenses charged or induce him to commit perjury. *Jones* v. *U. S.*, 362 U. S. 257 (1960).

Parenthetically, I note here with reference to the proof necessary to establish guilt in this case that it is different from that in the *Jones* case. There, the situation was one where mere possession of the narcotics would establish a prima facie case of guilt. Here, that is not the situation. In this case, possession standing alone is not sufficient to establish guilt. Adhering to the factual situation presented in the *Jones* case, the rule enunciated was that where proof of possession established a prima facie case of guilt a defendant could not be placed upon the horns of the dilemma to which Judge Learned Hand referred in the case of *Connelly* v. *United States*, 58 F. 2d 629 (C. A. 2, 1932). It may well be argued that a liberal application of the rule stated in the *Jones* case would extend it to one where possession

of stolen goods was an element of the offense charged by the Indictment, though not the only element of such offense which the Government would have the burden to establish. Hence, it may be reasoned that a defendant cannot be compelled to furnish any proof with respect to standing which would tend to incriminate him in any degree.

This poses the question of how far a defendant may be required to go to establish standing without invasion of his constitutional rights under the Fifth Amendment.

I do not feel that the *Jones* case eliminates interest in the premises as a material element of proof with respect to one who is claiming standing as a person aggrieved by an unlawful search and seizure because the Court in that case stated:

> "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone *legitimately* on the premises where a search occurs may challenge its legality by way of a motion to suppress when its fruits are proposed to be used against him." (Emphasis supplied.)

And then we have the significant language of that decision on this point. The Court further stated:

> "This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."

It seems to follow, that if a defendant is a stranger to the premises, having no legimate interest therein, he would have no right to claim himself a person aggrieved by a search of those premises when it is established, without

requiring him to incriminate himself, that such legitimate interest therein is non-existent. To hold otherwise would be to give no effect to the language of the Supreme Court which I have just quoted. Moreover, when a defendant voluntarily takes the stand to give testimony with respect to his interest in the premises, the Court is not depriving him of any constitutional right by accepting his tesimony. The constitutional right to rest upon any alleged presumption of lawful presence on the premises may be waived.

Moreover, the testimony of others than a defendant with respect to his presence upon the premises searched may also be considered in the determination of whether or not he had such legitimate interest therein as would place him within the classification of a person aggrieved by an unlawful search.

It is the opinion of this Court that, giving full effect to the *Jones* decision, it does not hold, as has been suggested by some of the defendants, that the Court may not consider any proof with respect to a legitimate interest in the premises of one who claims himself aggrieved by an unlawful search. The *Jones* decision seems to go no further than to hold, on the facts in that particular case, that the petitioner there was not required to go further than he did in his testimony which established a lawful presence upon the premises where the search occurred. Whether the may have rested on less is not clear.

In this case, Mr. Levine, the owner of the premises at 15 West 22nd Street, Bayonne, New Jersey, testified to the fact that he had rented this property to the defendant, John Joseph Zax, by oral agreement on a month-to-month basis at a monthly rental of $100 per month. According to Mr. Levine, the premises were rented to Mr. Zax for the

purpose of storing some furniture and other items which Mr. Zax possessed in connection with his restaurant and tavern business operated as the Hoo-Ha Club. This oral rental agreement was entered upon during the latter part of December, 1961. According to the testimony of John Joseph Zax, he found the premises in a dilapidated condition with broken windows and no heat and, in fact, in such general dilapidated condition that he was not prepared to expend the money that would be required to restore these premises to a usable condition.

The premises had been vacant for a considerable part of 1961, according to the testimony of the owner. The last tenant prior to Mr. Zax operated a garage there. Photographs introduced in evidence showing the appearance of the building, taken together with the testimony as to its condition, emphasizes that, at least as far as use was concerned, it was abandoned. It was vacant, and it would take considerable expensive renovation to restore it to a point where it could be put to some useful purpose.

Mr. Zax suggested, in connection with his testimony, that the storage of some furniture and some of his other equipment was merely an incidental use to that which he originally contemplated. He went on to say that he wanted to use the premises as a place where meetings could be held by the Garden State Betterment League, described as a civic charitable organization that had previously held meetings at his tavern and restaurant known as the Hoo-Ha Club. This defendant also testified that, during the early part of January, after he had given some consideration to the condition of the building and the use to which it could be put and the funds that would be necessary to renovate it, he entered into an oral sub-rental agreement with a man named Pope, and that he, Pope, paid the sum of $50 in cash

for the use of the premises for approximately two or three weeks. What Pope intended to do with the premises is not clear from the testimony. He was not seen in the vicinity after this alleged rental agreement.

The dfendant Zax did not visit the building after he rented it to Pope. Pope was never seen to take possession of it according to the testimony, and the owner, Mr. Levine, evidently knew nothing of the arrangement with Mr. Pope and knew of no activity in connection with any proposed use of this building, except as suggested to him by Mr. Zax.

As the sequence of events goes, following the oral rental agreement with Pope made on or about January 3 or 4, it seems that on the evening of January 11, 1962, approximately seven days after the oral rental agreement with Pope, the defendants, Harold Konigsberg, Joseph Juliano, Joseph Celso and Joseph Nalewajka, were found in the premises in which there was stored approximately 1700 suits of clothing piled in heaps on the floor on wrapping paper and plywood boards. There was also found on the premises a station wagon inside the building, and there were suits of clothes piled in the station wagon.

I have made some reference to the condition of the building, and I won't recite at length all of the evidence describing the general condition. Suffice it to say that the windows were boarded up, the heat was not operating, and its utility for occupational use, without expensive renovations, was non-existent.

It was, as far as I can determine from the evidence, still in a state of abandonment as to any usual or recognized legitimate business or other occupational use and, in that sense, continued to be a vacant, unoccupied building.

The defendant, Juliano, testified that, on the evening of January 11, 1962, he was in the Hoo-Ha Club and, while

there, was asked to move his car from where it was parked in front of the garage; that he went out and moved his car; that, after he had done so, someone called him and asked him to come inside the building. He went in.

When he was inside, the defendant Nalewajka told Juliano to pick out a couple of suits. Juliano testified he was in the building for one-half to three-quarters of an hour trying to find his size from the pile of suits that was stacked on the floor. Juliano stated that his arthritis was giving him trouble and that he couldn't find his size and wanted to get out. He was told to wait—that "we will all go out together" It was shortly after that that the lights were extinguished and then the door was raised, and Mr. Juliano had his opportunity to go out.

I find from the credible testimony that Mr. Levine was the owner of the building; that the defendant, John Joseph Zax, acquired a right to possession by oral rental agreement; that this defendant, after examination of the building, had reached the conclusion that he didn't have the money to make use of it for any immediate purpose and temporarily divested himself of such interest he may have had in it by renting it to Mr. Pope for a period of two to three weeks. I find that Mr. Levine, the owner, did not authorize anyone except Mr. Zax to use the building. Mr. Zax, according to his testimony, did not authorize anyone to use the building except Mr. Pope. It has been suggested here by counsel for the defendants Konigsberg, Celso, Juliano, and Nalewajka that they could have been in the building legitimately with the permission of Mr. Pope. But there is no evidence that would support this suggestion.

Considering all of the evidence relating to the alleged rental agreements, the condition of the building, and the

circumstances pursuant to which the defendants, Juliano, Nalewajka, Celso, and Konigsberg, were found therein on the evening of January 11, 1962, it seems to me that a reasonable inference can be drawn from this evidence that no one of them had any permissive right of use and occupation of the premises associated with any legitimate purpose. No one of them had any interest by virtue of title or rental agreement. It was obvious that no business was being conducted on the premises. The only use being made of the interior at the time these defendants were found there was the storage of contraband. Where an alleged right of privacy on the part of one found in the proximity of contraband goods is entirely disassociated with any right or color of right of lawful presence, it seems to me that the right of the privacy alleged is non-existent, and, therefore, invasion of such right cannot be claimed.

Moreover, it seems to me that, where the evidence adduced is susceptible of a finding by the trier of the fact that presence on the premises was not legitimate, the burden shifts to a defendant to come forth with evidence of a lawfully permissive presence to rebut the inference. He may choose not to do so and, in such event, the inference of unlawful presence may prevail.

I further find, with respect to this particular building, considering the state it was in as of January 11, 1962, that it was not, as to the defendants Juliano, Nalewajka, Celso, and Konigsberg, a building within which they could claim a right of privacy with attendant protection to them afforded by the Fourth Amendment. It has been held that a business office is protected, and so may be a store. A hotel room, under the Fourth Amendment, may become a person's house, and so, of course, may an apartment. An automobile may not be unreasonably searched, and neither may an occupied taxicab.

In this instance, we have a garage which is not part of the curtilage of any residence. There is no evidence that any business was being conducted in it. It was vacant and in an abandoned status so far as any use was concerned except storage of the contraband found on January 11, 1962. See comment in the case of *U. S.* v. *Fowler*, 17 FRD 499 (S. D. Cal., 1955), on pp. 502-503, concerning need for a search warrant to search a detached garage.

I find from the evidence relating to this particular garage that, at the time of the seizure of the clothing located therein, it was not a building within the purview of the Fourth Amendment whereby search thereof without a warrant would constitute an invasion of the privacy of any one of these defendants.

Now I could stop here with the holding that no one of these defendants, as I find from the evidence, has standing to challenge the seizure and to suppress the evidence as persons aggrieved by unlawful search and seizure, but we have spent considerable time in the taking of testimony, and I find it to be the obligation and duty of the Court to make a complete finding of fact with respect to probable cause for the arrests without a warrant and the searches incident thereto. Where a search and seizure are incident to a lawful arrest, the motion to suppress the evidence obtained must be denied. *Draper* v. *U. S.*, 358 U. S. 307 (1959).

By the provisions of Title 18 USC §3052, Agents of the Federal Bureau of Investigation are authorized to make arrests without a warrant if they have reasonable grounds to believe that the person to be arrested has committed or is committing a felony. An arrest made in accordance with the provisions of this statute is a lawful arrest.

This leads to the factual question of whether or not the Agents did, on January 11, 1962, at the time of the arrests, have reasonable grounds to believe that the defendants, Königsberg, Juliano, Celso and Nalewajka, had committed or were committing a felony.

On or about December 21, 1961, there was a massive shipment of men's suits and wearing apparel hijacked from New York State. There was no comparable theft of this character in the immediate geographic area. Investigation was conducted by the Agents of the Federal Bureau of Investigation. During the course of the investigation, attention was directed by an informer to the fact that large quantities of clothing were emanating from the area of the Hoo-Ha Club in Bayonne, New Jersey, and this information led the Agents, in the course of their investigation, to this particular area within which there was suspicion that the goods might be stored. Surveillance of the area began on January 10, 1962, and it was then that activities between the Hoo-Ha Club and the garage were observed. Among other activities, an automobile was observed to enter the apparently vacant garage and then come out of the garage and park. Thereafter, suits of clothing with white tags were observed in the automobile.

Considering up to this point the information furnished by an informer, the activities which the Agents had observed in the neighborhood of the Hoo-Ha Club, the nature and character of the garage, the suspicious circumstance that an automobile entered the garage and came out of the garage and had clothing in it. I find from such facts that there was sufficient reason to justify the further surveillance of this particular garage because of the possibility that some of the hijacked clothing might be stored therein.

Appendix B

Surveillance was continued on the night of January 11, 1962. The Agents, as I recall the testimony, arrived in the area at approximately 7:00 P.M. It was at approximately 9:00 P.M. that Mr. Juliano was observed moving his car from the front of the garage. Then, later, the door opened, and a station wagon entered the dark garage, and the door closed. Surveillance closed in, the Agents taking up positions on the east and west end of the front door to the garage.

While the Agents were stationed at the corner of the garage, they heard the rustling of paper and laughter from inside. No lights could be observed from the outside. Later, while the Agents were stationed outside, the door, operated from the inside, started to rise. After the door had arisen and the Agents came to the front opening, they were able, with the lights from the street and with the aid of their flashlights, to observe clothing piled in heaps on the floor and a station wagon with the front pointed to the door with suits piled in it and a man behind the wheel.

There has been considerable argument here with respect to the particular moment when the arrests occurred, the contention being that a search occurred before the arrests were actually made. I find, as a fact, that when the door arose, the contents of this garage were voluntarily disclosed to the Agents standing on the sidewalks; that the Agents then announced to all in the garage, "You are under arrest"; and that any search and seizure thereafter were incidental to the arrests.

On the issue of whether the Agents had probable cause to believe that a felony had been committed or was being committed by the occupants of the garage at the time of the arrests, consideration must be given to the following

pertinent information which they had prior to making the arrests: A shipment of approximately 3500 items of men's suits and wearing apparel had been stolen in New York State; it was the only theft of such magnitude that had occurred in the immediate geographic area. Information furnished by a confidential informer prior to January 9, 1962, led the Agents to the area of the Hoo-Ha Club in Bayonne. There was corroboration of this information by the activities which occurred in the neighborhood of the Hoo-Ha Club and the garage, specifically the entrance into the garage of an automobile and the observation that, when it came out of the garage and was parked, it had suits with tags on them loaded in it. The further and final corroboration occurred when the door of the garage was voluntarily opened by those in possession, disclosing before the eyes of the Agents who were conducting the surveillance clothing in great quantity piled in heaps on the floor and on wrapping paper and plywood, together with the further fact that the station wagon which had previously entered the garage empty was observed therein loaded with clothing. The boarding up of windows in the garage and the secretive manner in which all of the activities were conducted are further factual elements to be considered. There was also evidence as to the reputation of the Hoo-Ha Club, particularly as to the character of the people who frequented it.

It is my opinion that the knowledge which the Agents had prior to the making of the arrests of the defendants Konigsberg, Juliano, Celso and Nalewajka, as disclosed by the evidence, was certainly sufficient to generate a reasonable belief in the mind of any alert, intelligent police officer that a felony had been committed or was being committed by the occupants of the garage. Accordingly, I find,

as a fact, that the Agents, acting pursuant to the provisions of 18 USC §3052, did have reasonable ground to believe, at the time the arrests were made, that each person in the garage had committed or was committing a felony.

The defendant, John Joseph Zax, was not present in the garage at the time of the seizure of the contraband found there. He was arrested on January 12, 1962, as a result of the evidence seized and the information concerning his interest in the premises. Having found that the arrests of the defendants, Harold Konigsberg, Joseph Juliano, Joseph Celso, and Joseph Nalewajka, were lawful at the time they were made and that the seizure of evidence incident to those arrests was a product of a lawful search, I find that the defendant, John Joseph Zax, has no standing to move to suppress the evidence because of the fact that he was not present in this building in which he claimed a right of possession by his oral lease. *Clifton* v. *U. S. A.*, 224 F. 2d 329 (C. A. 4, 1955).

In concluding, there are some other observations that I wish to make in connection with my findings. It was contended here during the course of argument that the use of flashlights constituted such intrusion into these premises as to constitute a search. There is also argument advanced to the effect that the arrests took place when the officers stationed themselves outside the garage where they were in a position to prevent anyone from leaving the premises if they chose.

As to use of flashlights constituting a preliminary search before the arrests were made, I find that, under the circumstances existing with the garage windows boarded up, with activity going on inside, with a reasonable inference that lights were on inside but the view from outside was barred,

that when the doors opened in the manner in which it did with the lights then out, these police enforcement officers standing on the sidewalk were justified in using their flashlights in the performance of their duties, if for no other reason than to protect their own safety under the circumstances then existing. *Bell* v. *U. S.*, 254 F. 2d 82 (C. A., D. C., 1958).

I further find that no arrests were made at the time the F.B.I. Agents were stationed outside the garage prior to the time that the door was opened by those inside, but rather that surveillance was being continued, and that no arrests were intended or actually made until the garage door raised and the occupants of the garage involved did, by their own action, disclose what was inside. At that time, the Agents were still on the street, and the arrests did not occur until the Agents announced, "We are the F.B.I. You are under arrest."

There was another point raised touching upon the question of how much information would justify a reasonable person in reaching the conclusion prior to making an arrest that a felony has been committed or is likely to be committed. I find the test is not what an average person is likely to believe, but rather what a reasonably prudent law enforcement officer would have probable cause to believe under the same or similar circumstances. Probable cause is not a philosophical concept existing in a vacuum. It is a practical and factual matter, and consideration must be given to the training of a police officer and the capacity that he, in the exercise of reasonable judgment as a police officer, has to evaluate facts and to understand the import of facts and of circumstances. He is a person who has knowledge of what may constitute an offense and capacity to evaluate the facts known to him in terms of reasonable

belief. The test is what facts can be considered sufficient in any given case to generate in the mind of a reasonably prudent police officer a reasonable belief that a felony has been committed or is being committed.

The foregoing shall be deemed to be the findings of fact and conclusions of law of the Court, in lieu of the oral opinion heretofore stated upon the record; and, in accordance therewith, the motion of each of the defendants to suppress the evidence obtained by seizure of the men's suits and wearing apparel found on the premises at 15 West 22nd Street, Bayonne, New Jersey, on January 11, 1962, is denied.

Appendix B

Opinion of the United States Court of Appeals for the Third Circuit

(Filed—August 13, 1964)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 14563 to 14567 inclusive

UNITED STATES OF AMERICA,

v.

HAROLD KONIGSBERG, JOSEPH JULIANO, JOHN JOSEPH ZAX, JOSEPH CELSO and JOSEPH NALEWAJKA.

HAROLD KONIGSBERG, *Appellant in 14563.*

JOSEPH NALEWAJKA, *Appellant in 14564.*

JOSEPH JULIANO, *Appellant in 14565.*

JOHN JOSEPH ZAX, *Appellant in 14566.*

JOSEPH CELSO, *Appellant in 14567.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 16, 1964

Before McLAUGHLIN, KALODNER and STALEY, Circuit Judges

Appendix B

OPINION OF THE COURT

By McLAUGHLIN, *Circuit Judge.*

Appellants Konigsberg, Nalewajka, Juliano and Celso were indicted, tried and convicted of unlawful possession of goods stolen from interstate commerce in violation of Title 18 U.S.C. §659. Appellant Zax was indicted, tried and convicted of unlawful concealment of goods valued in excess of $5,000 which had been stolen from interstate commerce, in violation of 18 U.S.C. §2315.

Appellants argued that they had standing to move for the suppression of evidence, to object to its introduction and that the evidence should have been suppressed.

The case centers around the hijacking of some 3,000 men's suits in Parksville, New York. Approximately 1,700 of these were brought to Bayonne, New Jersey and placed in an old garage at 15 West 22nd Street that city. There was substantial evidence that on the night of January 11, 1962, the garage was located in a very poor neighborhood. It was unheated, its windows were constantly being broken by neighborhood children, it had been vacant since the early part of 1961, at least on one occasion the police had removed some old drunks who had entered through a side door. The owner of the building, testifying on behalf of the defense, said that he didn't take care of the building, that he wanted to get rid of it.

Zax said that he had leased this garage on a month to month basis at $100 a month in December, 1961. Levine, the landlord, a witness for Zax, said the latter rented the place for two months. Zax said he gave Levine a hundred

dollars cash. Levine says this was paid him "* * * the end of December in 1961." Zax claimed that he desired to store some furniture of the "Garden State Betterment League" in the garage. He had some furniture moved in during the first week of January 1962 and then had it taken out "* * * because it was raining in there. It was all wet and it was getting—the leather was starting to—I told them to take it back again because I wasn't going to do nothing more there for a while." The oil burner would not start because it was full of water. Asked regarding his intentions for the garage, he answered, "Well, I figured we would hold it for a while and try to get a tenant for it." He testified that around January 6, 1962, one Joseph Pope told him he "* * * would like to use it [the garage] for a week or two * * * I said; Well, you will have to get out if I get a steady tenant" and he said, "All right. I will rent it for a week or two." And he said "How much do you want * * *?" And I said "$50". Q. "And did you lease it to him?" A. "Yes." Around the second of January 1962, Zax saw two fellows in the garage who gave him "no good answer" as to what they were doing there. They had a bottle with them anyhow. Zax also explained that entrance could be made into the building "through the back". According to him, his intention had been to have glass put in the broken windows. However, on January 11, 1962, the windows had all been covered from the inside with plywood. Agent Tootell testified that Zax told him that he had personally boarded up the windows of the first floor of the garage building after he rented it from Levine. Zax during the critical period was manager of a saloon called the Hoo-Ha Club which was across the street from the garage.

In January 1962, prior to the 10th of the month, Walter L. Parker, a Federal Bureau of Investigation agent of approximately fourteen years experience, received a telephone

call from a reliable confidential source telling him that "there was apparently an unlimited quantity of Bond clothes available that was being disposed of in the Bayonne, New Jersey area." Some numbers on the tags of the clothing were given and the clothing was said to be in the area of the Hoo-Ha Club. The Bureau checked the clothing identification with the manufacturer who identified it as part of the stolen shipment. There was testimony that the reputation of Zax, the "operator of this bar" and at least some of its patrons "* * * in law enforcement is not too good". Because of all this the Bureau started a surveillance of the Hoo-Ha and garage location on the evening of January 10th. A car was noticed entering the garage about 8:30 that night. It backed out about ten minutes later and parked on 22nd Street. Several suits with white tags on them were seen lying on the back seat of the automobile. Appellant Juliano suddenly appeared on 22nd Street. A little later a man who came from the Hoo-Ha drove the car away.

About 9:30 the next night, Juliano moved an automobile from in front of the garage to allow a station wagon to back in. Several men left the Hoo-Ha and went into the garage and its door was closed. For about the next hour there was no light from the garage visible to the watching agents. The latter did hear "* * * the rustling of papers and a lot of laughter." Then the garage door was raised from the inside. Four Bureau agents were about two feet in front of the door as it opened. Their testimony is that the lights were off in the garage but with the light from the street and from their flashlights they saw in the garage piles of suits on the floor and in the station wagon. Appellant Celso was in the driver's seat of the station wagon. The agents told the people in the garage they were under

arrest. Juliano started to walk out. He and Celso, Konigsberg and Nalewajka who were also in the garage, were taken into custody. Under the circumstances, a search warrant, which had been obtained earlier, was not used. Zax was not in the garage at the time. He was arrested the next day.

Prior to trial the defendants moved to suppress the evidence of the stolen suits. The trial court took testimony and heard exhaustive argument on that motion for seven days. The motion as to Konigsberg, Juliano, Celso and Nalewajka was denied at the conclusion of the argument on the grounds: that the garage at the time of the seizure of the suits was not a building within the purview of the Fourth Amendment whereby search thereof without a warrant would constitute an invasion of the privacy of any of the defendants; that none of the defendants had standing to challenge the seizure as persons aggrieved by unlawful search and seizure and that "* * * as a fact the Agents, acting pursuant to the provisions of 18 U.S.C. §3052 did have reasonable ground to believe at the time the arrests were made that each person in the garage had committed or was committing a felony."

Against the overwhelming proof to the contrary, appellants make no attempt to argue that the garage involved was appellants' house within the purview of the Fourth Amendment in which they were entitled to Constitutional protection of their privacy. None of the defendants, including Zax, had a then present possessory interest in the garage. The only one, according to Zax as a trial witness, who had the right at that time to use the building was the mysterious Mr. Pope to whom Zax said he had rented the premises for a week or two on January 4th, 5th, 6th or 7th. Zax asserted that he had received the agreed fifty

dollars rent from Pope and had given him a key. As the trial judge mentioned in his opinion, there had been some suggestion by counsel for the other four defendants that the latter were in the building with the permission of Pope but there is no record support for this. Certainly, Pope was not produced at the trial. Zax stated regarding him, "I know he has not been around in quite a while." Beyond question if appellants were legitimately in the garage as invitees or guests of Pope as sublessee they might well have been under the Fourth Amendment umbrella. However, that is not the situation and, as above noted, there is no pretension that it is.

What appellants are really saying definitely and directly is that since they were caught cold in the garage with the stolen clothes, they were in possession of the clothes and therefor they do not have to prove either a right to be on the premises or to the clothes. Appellants point to their indictment for possession of merchandise stolen in interstate commerce as bringing them within the rule of Jones v. United States, 362 U. S. 257 (1960). The Jones decision concerned a prosecution for violation of federal narcotic laws. The defendant had been convicted under 26 U.S.C. §4704(a), with having "purchased, sold, dispensed and distributed" narcotics not in or from the "original stamped package" and under 21 U.S.C. §174 for having "facilitated the concealment and sale of" the same narcotics, knowing them to have been imported illegally into the United States. Both those statutory provisions permit conviction upon proof of the defendant's possession of the narcotics and, with respect to 26 U.S.C. §4704(a), of the absence of the appropriate stamps. As the Court said p. 258, "Possession was the basis of the Government's case against petitioner." The entire point of the Jones

opinion as far as we are concerned on this appeal is that the Supreme Court there extended the doctrine that a genuine possessory interest in the premises involved made out a sufficient interest in the premises to establish such person as one aggrieved by the search. The Court (page 267) extended the doctrine to include "* * * anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." That necessary condition did not exist here. Nor does the ambivalent argument that possession of the solen clothes in the defendants "eliminates any necessity for a preliminary showing of interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." Jones p. 263. That holding was specifically directed to the sui generis problem before the Court as to which the latter held p. 263, "The same element in this prosecution [narcotics] which has caused a dilemma i.e. possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, *which ordinarily is required when standing is challenged.*" (Emphasis supplied).

In Jones, by statute, proof of possession was enough to convict. The controlling law of this appeal has no such provision or intimation. Possession is only one element of the crime charged. The theft, interstate commerce, knowledge of the theft and value of the stolen clothes all were matters of proof by the Government without which the charge would fall as a matter of law. The Jones rule governs as of course in a proper case. It is not applicable to the issue before us. Cf. United States v. Romano, 203 F. Supp. 27, 30-31 (D. C. D. Conn. 1962). Ramariez v. United States, 294 F. 2d 277 (9 Cir. 1961).

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Appellants also argue that the arrests of the four defendants in the garage were without probable cause. The reason advanced for this proposition is that "At the time the arrest was announced the Agents were without reasonable grounds to believe that the persons arrested had committed or were in the process of committing a felony." Appellants in this statement are, as they must, giving the converse of the statutory power to arrest without warrant. 18 U.S.C. §3052. Actually the Agents had with them a search warrant for the garage building issued earlier in the day, January 11, 1962. At the garage, prior to the opening of its door from the inside, the Agents knew that some suits resembling the stolen shipment and bearing identification tags like those marking the missing suits had been brought from the garage the night previous. They had a whole series of incidents, some of which are briefly alluded to in the statement above, focusing on the Hoo-Ha Club, its management and habitues with particular reference to the garage, its condition, use and contents. The Agents were directly in front of and close to the garage door, prior to any opportunity of serving the warrant. At that time the door was opened from within and rose up leaving the interior of the garage in the plain view of the Agents. They, without search, saw a mass of men's suits with identification tags, piled up in a station wagon in the garage and on the floor thereof. Upon the entire factual circumstances, the Agents then had justifiable grounds for believing that a felony had been and was being committed. Arresting the four defendants in the garage was proper under the statute and called for on the part of the Agents.

Appellants allege substantial error because their motion for the name of the informant referred to in the above

factual statement was denied. In this instance reliance is placed upon Roviaro v. United States, 353 U. S. 53 (1957). That opinion sets out the basic standards under which the trial judge may require disclosure of an informant's identity. It occurs, as Mr. Justice Burton said for the Court, pp. 60-61, "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, * * *." From our own study of this record, the disclosure of the informer's name was palpably not essential to the fair determination of this cause. Nor was its relevancy and helpfulness to the defense shown. The preservation of the informer's anonymity is to encourage and protect him in performing his obligation to communicate knowledge of commission of crimes to law enforcement officials. As the Court said in Roviaro, p. 62:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The trial judge in this matter under its particular facts was well within his sound discretion in refusing to permit the informer's identity to be revealed.

The conviction of Zax for the statutory offense of concealment of the stolen property is protested as inconsistent

with the other verdicts returned and therefore the result of passion, etc. It is urged that acquitting Zax of possessing and storing the property makes it impossible for a reasonable jury to find him guilty of being a part of the deliberate, criminal concealment of the suits after their theft. It would seem to have weighed heavily with the jury, as far as the possession charge was involved, that Zax admittedly was not in the garage with the suits as were the other four when arrested. Pointing to the obvious sharp distinction between storage and concealment, the jury did not find anyone guilty of storage. The evidence was all to the effect that the suits were concealed in the dilapidated garage for the purpose of processing them for surreptitious sale, not for storage.

Zax was the lessee of the garage. He did testify that he subleased it to Pope for one or two weeks. The jury may not have believed this. There was valid evidence that Zax had to do with the boarding up of the garage windows during the critical period. He had the garage locks changed at that time. There was evidence that Zax stated that as late as January 9, 1962, he had allowed a truck driver, not identified, to unload his truck in the garage. An Agent testified that Zax, together with Nalewajka and Juliano, on January 9 and 10, 1962 while in the Hoo-Ha Club took turns looking across the street in the direction of the garage. The same Agent on January 9, 1962 saw Zax go from the Hoo-Ha and return shortly thereafter "• • • with some pieces of cardboard, a hammer and what appeared to be some thumb tacks." Then he and Nalewajka left and the Agent saw that "they were walking directly to this big building where there is an old garage there." Under all of the evidence the jury reasonably could, as it did, find Zax guilty of primary relationship to the concealment of the suits.

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On behalf of appellant Konigsberg, by way of supplemental brief, it is argued that the latter was denied the assistance of counsel under Escobedo v. State of Illinois, U. S. Sp. Ct., op. filed June 22, 1964. In that case petitioner was, according to the Supreme Court slip opinion, p. 4, "* * * a 22-year old of Mexican extraction with no record of previous experience with the police, * * *." The Supreme Court stated the facts as follows:

> "On the night of January 19, 1960, petitioner's brother-in-law was fatally shot. At 2:30 a.m. that morning, petitioner was arrested without a warrant and interrogated. Petitioner made no statement to the police and was released at 5 p.m. that afternoon pursuant to a state court writ of habeas corpus obtained by Mr. Warren Wolfson, a lawyer who had been retained by petitioner.
>
> "On January 30, Benedict DiGerlando, who was then in police custody and who was later indicted for the murder along with petitioner, told the police that petitioner had fired the fatal shots. Between 8 and 9 p.m. that evening, petitioner and his sister, the widow of the deceased, were arrested and taken to police headquarters. En route to the police station, the police 'had handcuffed the defendant behind his back,' and 'one of the arresting officers, told defendant that DiGerlando had named him as the one who shot' the deceased. Petitioner testified, without contradiction that the 'detectives said they had us pretty well, up pretty tight, and we might as well admit to this crime,' and that he replied, 'I am sorry but I would like to have advice from my lawyer.' A police officer testified that although petitioner was not formally charged 'he was in custody' and 'couldn't walk out the door.'

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"Shortly after petitioner reached police headquarters, his retained lawyer arrived. The lawyer described the ensuing events in the following terms:

'On that day I received a phone call [from "the mother of another defendant"] and pursuant to that phone call I went to the Detective Bureau at 11th and State. The first person I talked to was the Sergeant on duty at the Bureau Desk, Sergeant Pidgeon. I asked Sergeant Pidgeon for permission to speak to my client, Danny Escobedo * * *.' "

The attorney was not allowed to see his client. Continuing with the facts, the Court said p. 4:

"It is undisputed that during the course of the interrogation Officer Montejano, who 'grew up' in petitioner's neighborhood, who knew his family, and who uses 'Spanish language in [his] police work,' conferred alone with petitioner 'for about a quarter of an hour * * *.' Petitioner testified that the officer said to him 'in Spanish that my sister and I could go home if I pinned it on Benedict DiGerlando,' that 'he would see to it that we would go home and be held only as witnesses, if anything, if we had made a statement against DiGerlando * * *, that we would be able to go home that night.' Petitioner testified that he made the statement in issue because of this assurance. Officer Montejano denied offering any such assurance.

"A police officer testified that during the interrogation the following occurred:

'I informed him of what DiGerlando told me and when I did, he told me that DiGerlando was [lying] and I said, "Would you care to tell DiGerlando

that?'' And he said, ''yes, I will.'' So, I brought * * * Escobedo in and he confronted DiGerlando and he told him that he was lying and said, ''I didn't shoot Manuel, you did it.'' '

''In this way, petitioner, for the first time, admitted to some knowledge of the crime. After that he made additional statements further implicating himself in the murder plot.''

The Assistant State's Attorney ''* * * testified that he did not advise petitioner of his constitutional rights and it is undisputed that no one during the course of the interrogation so advised him.''

The Supreme Court of Illinois originally held the statement inadmissible and reversed the conviction, saying:

''It seems manifest to us, from the undisputed evidence and the circumstances surrounding defendant at that time of his statement and shortly prior thereto, that the defendant understood he would be permitted to go home if he gave the statement and would be granted an immunity from prosecution.''

On rehearing, the conviction was affirmed, the court finding the confession was voluntary. As to that phase of the matter, the Supreme Court, pp. 7-8, commented:

''The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime.' Spano v. New York, 360 U. S. 315, 327 (Stewart, J.,

concurring). Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told petitioner that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement.[5] As this Court observed many years ago:

> 'It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with a crime, the result was to produce upon his mind that fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself.' Bram v. United States, 168 U. S. 532, 562.

"Petitioner, a layman, was undoubtedly unaware that under Illinois law an admission of 'mere' complicity in the murder plot was legally as damaging as an admission of firing of the fatal shots. Escobedo v. Illinois, 28 Ill. 2d 41. The 'guiding hand of counsel' was essen-

[5] "Although there is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation, there is no evidence that they discussed what petitioner should, or could, do in the face of a false accusation that he had fired the fatal bullets."

tial to advise petitioner of his rights in this delicate situation. Powell v. Alabama, 287 U. S. 45, 69. This was the 'stage when legal aid and advice' were most critical to petitioner. Massiah v. United States, supra, at i. It was a stage surely as critical as was the arraignment in Hamilton v. Alabama, 368 U. S. 52, and the preliminary hearing in White v. Maryland, 373 U. S. 59. What happened at this interrogation could certainly 'affect the whole trial,' Hamilton v. Alabama, supra, at 54, since rights 'may be as irretrivably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' Ibid. It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder."

And on p. 10, the Court, speaking directly to the undisputed drive for a confession in Escobedo said, "There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice."

From the above statement of the exact situation in Escobedo, the Court concluded, pp. 12-13:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the policy carry out a process of interrogations that lends itself to eliciting incriminating statements, the

> suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U. S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

The Court strongly emphasized its above finding in the final paragraph of its opinion, saying:

> "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' Spano v. New York, 360 U. S. 315, 327 (Stewart, J., concurring), by gathering information from witnesses and by other 'proper investigative efforts' Haynes v. Washington, 373 U. S. 503, 519. We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

The ruling of the Supreme Court is very clear and as of course is to be, and will be, followed explicitly where applicable. The facts of the appeal before us are well without the range of the Escobedo decision. The subject matter here involved was some stolen clothing. Konigsberg was one of five people found with the merchandise. At the time of trial he was thirty-five years old. He had been convicted of robbery in 1949. From his own testimony he was

well acquainted with police arrest procedures. All of the people in the garage were told "This is the F.B.I. You are under arrest." The prisoners were instructed to put their hands against the garage wall. Konigsberg refused so the officers put handcuffs on him. Shortly after that all the prisoners were taken to the F.B.I. office in Newark, a few miles west of Bayonne, in several ordinary passenger cars driven by agents. Konigsberg rode with Agents Straub and Roetzel. Straub advised him that he was entitled to an attorney and that anything he said might be used against him in a court of law. At the F.B.I. office the prisoners were fingerprinted and photographed. Konigsberg had approximately $11,000 currency on his person which he meticulously counted with the agent. Straub testified that "* * * we asked him the circumstances as to why he was in this garage and just what had taken place. * * * We desired to talk and see if he wished to cleanse himself or explain. * * * As to why he was there, what his reasons for being there were, why the other individuals were there." Konigsberg's attorney, who was cross-examining Straub at the time, then said to Straub "Q. If he could explain." Straub answered, "If he could explain. We wanted to hear his side of the story that would come from him, if it would. We had to fingerprint Mr. Konigsberg. We had to photograph him." Agent Roetzel, also there, said that in the course of the talk Konigsberg

> "* * * made a statement that this was the only legitimate arrest that the F.B.I. had ever made of him. He made a statement that this was one thing that we had, meaning the F.B.I.— * * * He made the statement that there was one thing that we had that he didn't have, and that was stool pigeons, and he made the statement when he was asked what he was doing in the

garage, he said, 'In what garage?' Then followed by a statement that, 'I was trying to help a fellow out.'"

Konigsberg, on the witness stand, denied that he was told by the F.B.I. that he was entitled to a lawyer. Straub stated that Konigsberg on the way to Newark said he wanted to make a telephone call but did not say to whom or the purpose of the call. After the photographing and fingerprinting of the appellants was completed, they were taken across the street to Newark Police Headquarters where Konigsberg was permitted to telephone. He, at that time, telephoned an attorney.

Straub testified that the talk with Konigsberg "* * * was more like a conversation than an interview." He was asked "* * * did you in any way threaten Mr. Konigsberg or extract from him any answers?" He answered "No. I did not threaten Mr. Konigsberg." Asked, "How were these statements that were given by him made?" He answered "This was just a discussion back and forth, at which time he volunteered these statements."

From all of the above, the trial court found:

"As I stated before, I find from the testimony I have heard that the statements made by the defendant Harold Konigsberg when he was in custody were not involuntary statements but on the contrary that they were made voluntarily by him and he had been advised of his rights to counsel and of the fact that anything he might state could be used against him. He was, as I find from the testimony, warned before he made any statements that he was not required to make statements, that any statements he did make could be used against him.

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"He was likewise advised of his right to counsel.

"There is no evidence of any intimidation, no evidence, circumstantial or otherwise, that he was under duress or that any hope of reward or promise of leniency were held out to him to induce statements.

"He might well have chosen to refuse to say anything. He chose to make comments, and the text of them would indicate the voluntary nature."

In this appeal at the time the F.B.I. agents talked with Konigsberg the process was definitely investigative and never shifted to accusatory. Its purpose was not to elicit a confession; there were no threats or attempt to extract admissions from Konigsberg, damaging or otherwise. The uncontradicted purpose of the discussion was to give Konigsberg a chance to explain his presence in the garage if he could; to hear Konigsberg's side of the story. None of that is denied by Konigsberg. Focus was not centered on Konigsberg, there was a general inquiry in progress concerning the unsolved hijacking of the Bond clothing. If Konigsberg or any of the other people caught in the garage could account for their presence this was their opportunity. Nor was there any thought of the alleged tactic in Escobedo of promising if one or more of the prisoners were accused by him Konigsberg would go free. There is nothing in this appeal of Konigsberg which could reasonably bring it within the scope of the Escobedo doctrine.

Since Escobedo is inapplicable to the situation before us, the argument that Konigsberg's statement was involuntary and therefore he was deprived of due process of law under Jackson v. Denno, U. S. Sp. Ct. opinion filed June 22, 1964, must fall.

There were other points on behalf of appellants. We have examined these. They are without merit and need no discussion.

These appellants were given a fair, patient trial. They were competently and tenaciously defended. We find no error.

The judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

Judgment of the United States Court of Appeals Sought to be Reviewed

(Entered on August 13, 1964)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,567

UNITED STATES OF AMERICA,

v.

HAROLD KONIGSBERG, JOSEPH JULIANO, JOHN JOSEPH ZAX, JOSEPH CELSO and JOSEPH NALEWAJKA.

JOSEPH CELSO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ——— DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, KALODNER and STALEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed July 16, 1963, entered July 17, 1963, of the said District Court in this case be, and the same is hereby affirmed.

ATTEST:

HARRIET G. HUMPHREYS
Chief Deputy Clerk

August 13, 1964

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746-705—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 492

JOSEPH CELSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a–38a) is not yet reported. The opinion of the district court denying a motion to suppress (Pet. App. 3a–18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1964 (Pet. App. 39a–40a). The petition for a writ of certiorari was filed on September 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the arrest without a warrant of petitioner and others in a garage was valid, so that stolen

goods seized as incidental to the arrest were admissible in evidence.

2. Whether the trial court abused its discretion in refusing to compel the government to disclose the identity and whereabouts of its confidential informant whose initial information led to the arrest and seizure.

3. Whether the court's charge was proper.

STATEMENT

Petitioner and several co-defendants were convicted in the United States District Court for the District of New Jersey of possessing goods valued in excess of $100, constituting part of an interstate shipment, with knowledge that they were stolen, in violation of 18 U.S.C. 659. He was sentenced to imprisonment for three years (R. 325a–326a). On appeal (328a–335a) the conviction was affirmed (Pet. App. 39a–40a).

1. Evidence at a hearing on the defendants' pretrial motion to suppress evidence seized on January 11, 1962 (R. 18a–19a) may be summarized as follows:

Mr. Levine, a witness for defendant Zax, testified that he owned a garage at 15 West 22nd Street, Bayonne, New Jersey, which had originally been a fire house owned by the city (R. 21a). The garage had a center electrical door which could be operated only from the inside (R. 2b–3b). The building, which had been vacant since the early part of 1961, was unheated, and the windows were constantly broken by neighborhood children (R. 1b, 3b). Drunks, who could enter the back of the garage without a key, sometimes slept there (R. 4b–6b). The garage was

diagonally across the street from the Hoo-Ha Bar, located at 8–10 West 22nd Street, which was managed by Zax (R. 24a, 25a, 45a).

In the latter part of December 1961, Levine leased the garage to Zax on a month to month basis for $100 per month, to begin on January 1, 1962 (R. 21a–22a, 27a). At that time only one window was boarded up (R. 4b), but by January 11, 1962, all the windows were covered from the inside with plywood (R. 2b, 136b). Zax testified that on January 4 or 5, 1962, he subleased the garage to Joseph Pope, described as a local businessman, for $50 (R. 29a–30a).

Evidence on behalf of the government showed that on the evening of December 21, 1961 a truck, en route from Rochester to New York City with a load of about 3500 suits, was hijacked near Parksville, New York (R. 42a–43a). Some time prior to January 10, 1962, an informant telephoned F.B.I. agent Parker that an unlimited quantity of Bond clothes was being disposed of in the Bayonne area in the vicinity of the Hoo-Ha Bar. He gave specific manufacturers' label numbers for the garments (R. 52a, 94a, 95a, 26b). The agent recognized the telephone voice of the informant, who in the past had given completely reliable information which on several occasions had led to the solution of crimes (R. 94a–95a, 103a, 104a, 26b, 27b).[1] The identification numbers were sent to the Buffalo F.B.I. office with a request that they be

[1] Defense counsel asked for the name of the informant, but government counsel's objection that this was a confidential source which could not be divulged was sustained (R. 53a–60a).

checked (R. 51a, 11b). These numbers were identified by the manufacturers as being from the hijacked shipment (R. 51a, 10b–11b).

On January 10, 1962 at about 7:00 p.m., on the strength of the informant's corroborated information and the reputation of the Hoo-Ha Bar,[1] F.B.I. agents began a surveillance of the area (R. 44a-45a, 52a, 76a, 85a). When an automobile was parked on the south side of West 22nd Street and the driver entered the Hoo-Ha, an agent walked past the vehicle and observed that it was empty (R. 76a–77a). At about 8:20 p.m., the automobile was driven into the garage at 15 West 22nd Street (R. 77a–78a). Shortly thereafter it was driven out of the garage and was parked abreast of an F.B.I. car on West 22nd Street (R. 78a, 13b). After the driver, identified as defendant Juliano, entered the Hoo-Ha (R. 79a, 13b–14b), agent Straub walked past and, with the aid of the street lights, saw several suits with white tags lying on the back seat of the car (86a, 23b–24b). A few minutes later a man emerged from the Hoo-Ha and drove the car away (R. 79a).

On January 11, 1962, between 3:00 and 5:00 p.m., F.B.I. agents obtained a search warrant for the garage (R. 83a, 88a–89a, 299a–303a). At 7:00 p.m., surveillance was resumed by about 10 or 12 agents (R. 46a, 61a, 80a). At about 9:30 p.m., a man parked a Ford station wagon on the north side of West 22nd Street

[1] Zax, the operator of the bar, was a gambler with a criminal record; patron Juliano had concealed weapons charges on his record; and patron Konigsberg had numerous arrests and had reportedly been engaged in "shylocking" (R. 18b–23b).

and entered the Hoo-Ha. A few minutes later three men came out and walked across the street to the garage (R. 80a). One of these men, Juliano, moved a parked Pontiac so that the station wagon could be backed into the garage, after which the garage door closed (R. 80–81a). No lights were visible from the outside of the garage, but the agents could hear the rustling of papers and laughter (R. 87a). After the agents waited for about an hour (R. 47a, 81a, 87a) the garage door began to be raised by the occupants. Four agents were standing on the sidewalk in front of the garage (R. 25b, 15b, 11b–12b, 62a–63a). Although the lights in the garage had been turned off (49a, 16b), the street lights and flashlights held by several agents enabled them to see into the garage (R. 49a, 64a, 7b–8b, 12b, 17b). The agents saw piles of suits, some as near as five feet away, on the floor of the garage (R. 49a, 88a, 9b, 15–16b). Suits piled in the Ford station wagon were also visible (R. 7b, 14b). Petitioner was in the driver's seat of the station wagon, which was facing the garage door (R. 48a). The agents identified themselves as F.B.I. men and announced that the occupants of the garage were under arrest (R. 84a–85a, 88a, 16b, 25b). The agents arrested petitioner, Juliano, Konigsberg and Nalewajka (R. 50a).[1] The search warrant was not executed, since the four defendants in the garage were arrested pursuant to 18 U.S.C. 3052 upon the reason-

[1] The agents found a fifth man, Laguardia, nearby but he was released when none of the agents said he had come out of the building (37b–39b). Agents Parker and Roetzel both said that Laguardia was not the informant (R. 40b, 89b).

able belief that a felony was being committed. On January 12, 1962 defendant Zax was arrested under an arrest warrant (R. 50a–51a).

At the conclusion of the hearing on the motion to suppress, the court denied the motion, on the alternative grounds (a) that the defendants lacked standing to object to the search and seizure and (b) that the search and seizure were proper as incident to a valid arrest (R. 305a–320a). At the trial, the court overruled the defense objection that testimony concerning the contents of the garage was inadmissible on the ground that the contents were the fruit of an illegal search and seizure (R. 140b).

2. At the trial petitioner testified on his own behalf that he met a stranger in a restaurant who wanted to rent his station wagon for $25. Under instructions from this stranger, petitioner backed his station wagon into the garage (R. 266a–267a). In the garage there were people who were unknown to petitioner (R. 119b–120b). As petitioner was about to leave, one man, who was loading suits into petitioner's station wagon, told him to wait outside for the "boss" [the stranger who rented petitioner's station wagon] (R. 120b). Petitioner never saw the "boss" again or looked for him (R. 121b). Petitioner admitted three previous convictions for burglary, theft, and conspiracy to violate provisions of the Internal Revenue Code relating to liquor (121b).

ARGUMENT

1. While both courts below undertook to discuss to question of standing, we do not rely upon any lack of standing as justification for the admissibility of

the evidence.[4] We rely, rather, upon the alternative ground that the seizure was incidental to petitioner's lawful arrest without a warrant under 18 U.S.C. 3052[5] by F.B.I. agents who had probable cause to believe that he was committing a felony. See *Draper* v. *United States*, 358 U.S. 307, *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145. The agents had information from a reliable informant that an unlimited number of suits were being disposed of in the vicinity of the Hoo-Ha Bar. The reliability of the informant was corroborated when the numbers he gave proved to have come from the hijacked shipment. The agents knew that on the previous night suits with identification tags similar to those in the stolen shipment had been removed from the garage. They were also aware that men coming from the disreputable Hoo-Ha Bar had entered the garage. When the door was opened from within, and suits were seen on the floor of the garage and in petitioner's station wagon, the agents had ample cause for the arrests.[6]

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[4] Petitioner would seem at least to have standing to attack the seizure of the suits taken from his station wagon.

[5] 18 U.S.C. 3052 provides in pertinent part: "* * * agents of the Federal Bureau of Investigation * * * may * * * make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

[6] *United States* v. *Coplon*, 185 F. 2d 629 (C.A. 2), certiorari denied, 342 U.S. 920 (Pet. 18) is not in point. It was decided prior to the amendment of 18 U.S.C. 3052 on January 10, 1951 allowing F.B.I. personnel to make arrests without a warrant on probable cause.

2. The contention that the court erred in not requiring the government to disclose the identity of the informant whose information started the investigation, is answered by this Court's decision in *Rugendorf* v. *United States,* 376 U.S. 528. Petitioner made no showing that the name of the informant was necessary to his defense. Indeed, agent Roetzel testified at the hearing on the motion to suppress that the informant gave no indication that he was related in any way to the hijacking, transportation, sale, or distribution of the stolen clothing (R. 8b). There was also testimony by agents Parker and Roetzel that Laguardia, the fifth man discovered near the garage and later released, was not the informant (R. 40b, 89b). Thus there was no showing that the identity of the informant had any bearing on the offense for which petitioner was convicted.[1]

3. (a) In its original charge the court stated (R. 261a): "I do not recall any evidence in this case upon which that defense [entrapment] might rest, but it is, as I have said before, your recollection of the testimony and not mine that governs. Therefore I will charge the law relating to this defense." The court then gave instructions on the law of entrapment (R. 261a–262a). At the conclusion of the charge petitioner's counsel, Mr. Querques, objected to the court's statement that it did not recall any evidence upon

[1] Petitioner suggests that the informant may have been the stranger who wanted to rent his station wagon and brought him to the garage (Pet. 10). If there were such a man it seems reasonable that petitioner would have tried to contact this stranger; but petitioner testified that after his arrest he never saw this man again and made no attempt to look for him (R. 121b).

which the defense of entrapment could rest, and to the court's instruction that entrapment pertained only to action by government officers, and not to others acting on behalf of such officers (R. 279a–281a). The court then corrected its charge, giving supplementary instructions that anyone acting on behalf of the government, as well as government officers, could be guilty of entrapment. The court again charged that, despite its statement that it did not recall any testimony making the defense of entrapment applicable, it was the jury's recollection, not the court's, which governed (R. 285a–287a). Thereafter petitioner's counsel stated he had no further objections to the charge (R. 290a). It is clear therefore, that when the charge is read in its entirety, as it must be (*Boyd* v. *United States*, 271 U.S. 104, 107; and see R. 240a), the law on entrapment was properly presented to the jury, whose duty it was to decide the issue. *Masciale* v. *United States*, 356 U.S. 386.[8]

(b) The other objection to the instructions which petitioner now raises was not made at the trial and is without merit. There is no conflict between the initial instructions as to guilty knowledge and the later ones on actual and constructive possession. The requirement that the accused should have guilty knowledge that the goods had been stolen was stated on numerous occasions in the original charge (R. 244a, 246a, 247a, 250a, 251a, 259a). Later the jurors re-

[8] *United States* v. *Nani*, 218 F. 2d 730 (C.A. 2) (Pet. 13–15) is inapposite. In *Nani*, unlike the instant case, the instructions contained no intelligible statement as to what constituted the defense of entrapment, and the jury was improperly instructed that only a government employee could entrap the accused.

quested only a definition of the term "possession" (R. 291a, 294a), but did not ask for definitions of elements related to possession, such as guilty knowledge or interstate commerce. In then re-charging the jury on the requested narrow issue by defining different kinds of possession (R. 294a–296a), it was not necessary that the court restate the requirement of guilty knowledge since this had already been exhaustively covered in the original charge.

There is nothing in the supplemental charge defining constructive possession (R. 295a) which conflicts with the original charge on this subject (R. 256a). Nowhere in the supplemental charge is there any express or implied instruction that constructive possession, without more, would permit the jury to draw an inference of guilty knowledge. In order to find petitioner guilty the jury was required to make an independent finding of his possession with guilty knowledge that the goods had been stolen, as required by the original charge (R. 244a, 250a, 259a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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